STATE OF WISCONSIN
SUPREME COURT

FRIENDS OF FRAME PARK, U.A.,

Plaintiff-Appellant,

v.

Appeal No. 2019AP96
Cir. Ct. No. 17-CV-2197

CITY OF WAUKESHA,

Defendant-Respondent-Petitioner

APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 26, 2018 IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

PLAINTIFF-APPELLANT'S RESPONSE BRIEF

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RESPONSE TO CITY'S STATEMENT OF THE CASE

The City's Statement of the Case sets forth below the basic chronology of events. Further detail and clarification is required and is set forth below.

This matter arises from an open records request served on the City of Waukesha in October 2017. The City responded but withheld certain records. In an October 23, 2017 letter from the City Attorney accompanying the responsive records, the City asserted it was permitted to withhold certain records pursuant to an exception in the Open Meetings law. *See Plaintiff-Appellant's Supplemental Appendix at p. 38-39 (Hereinafter "Supp App, __").*

The underlying activity of the City, and the subject of the records request, was the City's involvement with a private business, a collegiate baseball promoter called Big Top Baseball. Big Top's plan was to engage the City to re-purpose the City's public park, Frame Park, into a for-profit baseball stadium operation. *See Supp App. pp. 32-35, Objection/Legal Position Statement filed with City.* The records withheld were draft contractual documents between the City and Big Top. *See Supp-App. pp. 49-87.*

Plaintiff-Appellant, Friends of Frame Park filed the underlying case in Waukesha County Circuit Court on December 18, 2017. The Common Council for the City was set to meet the next day on December 19, 2017.

A review of the Council meeting and other submissions makes clear that the issue was controversial. However, the issue of the contracts and the City's

apparent business partnership with Big Top was only briefly addressed at the Council meeting. *Supp. App. 25-31, Minutes of December 19, 2017 Council meeting.* The City points to this meeting as somehow removing its need to withhold the records. Yet nothing in the public record shows that any action was taken regarding the plan to convert Frame Park and to allow Big Top's plan to go forward. That plan was not rescinded or cancelled at the December 19, 2017 meeting, just the opposite. *Supp. App. p. 30 p. 6 of minutes.*

What also did ***not*** happen at the December 19th Council Meeting was a "closed session meeting" wherein the City Council members met out of public view to address the Big Top Contract and Frame Park redevelopment. Yet in its briefing, the City has continued to suggest that the December 19th meeting included a closed session to discuss the draft contracts:

> [The records] were disclosed one day after the City's Common Council had met in closed session to review and consider the documents. The Common Council met in closed session pursuant to the exception to the Open Meetings Law set forth in Wis. Stats. § 19.85(1)(e).

See City's Petition for review at p. 5.

In its most recent brief the City states that:

> The records that had been withheld – the draft contracts – were disclosed one day after the City's Common Council had met to consider those documents, and two days after the commencement of the action.

City's brief at p. 4

The City's brief contains no citation to the record to support this

assertion. The City also states that:

> The Court of Appeals, unlike Friends, does not claim that the City's Common Council would violate the Open Meetings law by entering into a closed session to review and consider the draft contracts.

See City's Brief at p. 35.

The City general cites to the Court of Appeals Decision at ¶ 49 for this assertion. However the Court of Appeals noted that the meeting minutes from the December 19, 2017 Council meeting were at best "unclear" about what transpired. *See Petitioners App at p. 129; Decision at ¶s 49-50.* The Court of Appeals was being generous. The reality is that no closed session was noticed or on the agenda for the meeting and no such session occurred. *See Supp. App. p. 25-31.* Further, the Council did not review the draft contracts. *Id.*[1]

The City, through the City Attorney, released the withheld records the day after the Council meeting on December 20, 2017. *Supp. App. p. 40, Email between counsel.* This did not end the matter and the circuit court case proceeded to a scheduling conference and pre-trial discovery. The City filed a motion for summary judgment. The circuit court held a hearing on November 5, 2018 and

[1] These facts are relevant to causation and are noted as such. The issue of whether records can be held confidential pending review by the Common Council is raised by the City and addressed by the Court of Appeals and herein. That issue is raised as part of the City's argument that such a process is necessary and appropriate and allows for withholding of certain types of records. That issue can be evaluated with respect to whether it is a proper basis to withhold the records under Wis. Stats. § 19.35 separately from whether the Council actually received and reviewed the records at the meeting. However, the facts show that the draft contracts were not reviewed in closed session or otherwise and nothing changed with respect to the Frame Park/Big Top development as a result of the December 19, 2017 meeting. *See Petitioners' App at p. 117,*

thereafter issued its ruling from the bench on November 9, 2018.

The Circuit Court determined that the City's justification for withholding the records was sufficient to allow that action by the City. The Circuit Court also determined that the filing of the Court case was not a cause for the City to release the records, which eliminated the ability for Friends to recover attorneys fees pursuant to Wis. Stats. § 19.37(2).

A. History of Negotiations between City Officials and Big Top Baseball.

The City of Waukesha through its City Administrator Kevin Lahner first communicated with representatives of Big Top Baseball ("Big Top") regarding converting Frame Park into a professional baseball park in the fall of 2016. *Supp. App at 12-14, Depo. of K. Lahner at p. 36 et seq.* Negotiations with Big Top, which is a private party, began soon thereafter and were ongoing from late 2016 and continued through spring of 2017 and thereafter into the fall of 2017. *Id.* Public awareness grew through the summer and into the fall of 2017. The project was quite controversial. The reason for the controversy was that far from simply building a new ball diamond to replace the existing public baseball field at Frame Park, the ambitious plan being discussed called for the City to use public taxpayer/TIF money to build a new stadium facility. *Supp. App. at p. 32-35, Objection filed with City.*

Big Top Baseball, in the form of a separate LLC called Big Top

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Decision at ¶28 n. 7.

Waukesha, LLC, would control the stadium. Big Top would presumptively be entitled to all revenues and would operate the facility for profit. The facility would be controlled by Big Top and only be used as per its discretion. *Supp. App. p. 49-87, e.g. p. 49 at recital No. 2, p. 50 at "scheduling"* Early drafts of an agreement between the City and Big Top make clear that these terms and conditions were being negotiated in detail as early as Spring of 2017. *Supp. App. p. 41, Email by K. Lahner.*

In May 2017, the City Administrator sent an email to certain private parties who were involved in the behind-the-scenes discussions asking them to keep information about the Frame Park project secret and not share it with the Waukesha City Council:

> Please keep the information regarding the Frame Park improvements confidential as we are not yet ready to discuss it with the entire City Council until we are further along.

Supp. App. 41, May 19, 2017 Email from City Administrator to non-city third parties.

By early summer of 2017, word was getting out about the City Administrator's plan to convert Frame Park. However, very little was publically discussed at City Council meetings. Questions persisted. Finally in an email on October 2017, the City Administrator explained that:

> **Status:**
>
> After learning in July/August that the League had chosen Big Top Baseball as their preferred partner for a new team in this area we *began working through the negotiation process for a use*

> *agreement for Frame Park.* We are nearing the end of the negotiation process and are planning a public meeting schedule. The public meetings will include a General Public Informational Meeting, Parks Recreation and Forestry Board, Finance Committee and the Common Council. This is pretty typical for a potential project that has a parks impact and a financial impact. ....

Supp. App. 44-45, October 22, 2017 email from City Administrator (emphasis added).

In hindsight, this turned out to be inaccurate because extensive negotiations and draft contracts had already been exchanged between the City Administrator and the attorneys and other representatives of Big Top well before the July/August time frame represented by the City Administrator.

The Friends of Frame Park, U.A. was formally established in November of 2017. However, a group of Waukesha citizens, property owners, and tax payers had been acting as an organized group for several months before that time. By the early fall of 2017, questions and concerns mounted. One of the members of the group, Scott Anfinson, prepared and submitted the open records request that is at issue in this matter on October 9, 2017. The request has several parts and included the following:

> 6. Please include any Letters of Intent (LOI) or Memorandum of Understanding (MOU) or Lease Agreements between Big Top Baseball and or Northwoods League Baseball and the City of Waukesha during the time frame of 5-1-16 to the present time frame.

Supp. App. p. 36, October 9, 2017 records request.

While the request was submitted to the City Administrator, the City

Attorney prepared a written response and provided that to Mr. Anfinson on October 23, 2017. *Supp. App. p. 38.* In that response, the City Attorneys office acknowledges that it is producing records but also that it is withholding certain records which would otherwise be responsive. These records were the contractual documents and correspondence between the City and Big Top. The City Attorney's letter states that the City has determined to withhold from its production of records a so-called "Park Use" Contract. The City Attorney explained in pertinent part that:

> Because the contract is still in negotiation *with Big Top,* and there is at least *one other entity that may be competing with the City of Waukesha* for a baseball team, the draft contract is being withheld from your request, pursuant to Wis. Stats. §§19.35(1)(a) and §19.85{1)(e).

Supp. App. p. 38.

Based on this response it is apparent that the City was engaged in negotiations with Big Top Waukesha, *and only Big Top Waukesha,* regarding the re-development of Frame Park into a baseball stadium operation. The letter also asserts that there is some competition, "for a baseball team," that the City and/or Big Top is a part of at that time. However, on October 22, 2017, the day before the City's Attorneys response letter, the City Administrator issued an email to the Mayor and other City Officials. The email suggests that he had waited until "July/August" to learn whether Big Top or another entity was awarded the franchise from the league before getting involved in negotiations

with Big Top. *Supp. App. p. 45, October 22nd email at "status."* Thus, according to the City Administrator, the competition with other entities was over by July/August. As noted, the City Attorneys October 23, 2017 letter takes the opposite position, explaining that the competition was still ongoing at that time. Moreover, negotiations with Big Top had been ongoing long before July/August 2017 as the City Administrator discussed in his deposition.

> Q. You mentioned that the first contact you had I think with Big Top was in August of 2016.
>
> **A. Yes.**
>
> Q. And then we see e-mails and other information about -- related to the Frame Park baseball project sometime after that, spring of 2017. And then later, about a year ago now in the fall of 2017, there are meetings at the city and there's e-mails and such, and Big Top **is** the other party **in** the contract at that time; **is** that correct?
>
> **A. Yes.**
>
> Q. And throughout that time I should have said.
>
> **A. Yes.**
>
> Q. Was there ever a time when you or anybody at the City sought other submissions, or bids perhaps they'd be called, from people beyond – from entities other than Big Top Waukesha connected to the Frame Park baseball project?
>
> **A. No.**
>
> Q. Was that ever a consideration in your mind, to seek other potential contracting parties for the team?
>
> **A. Before the conversations started I considered who might be a good partner.**
>
> Q. Okay. About when was that, if you recall?

A. It was around August of 2016.

Q. And what was the reason, the basis that you consider them to be a good partner?

A. I did research on the big -- the different Northwoods League franchises, and I looked at their track records and what they owned and if they had had success or not. And that's what I did.

Q. During this research did you become aware of the group that Mr. Kelneck was associated with?

A. No.

Q. Did there come a point in time where you in your judgment and under your understanding of your duties as City administrator made a determination that the Big Top group was the one that you wanted to partner with on behalf of the City; did that happen at some point in time?

A. Yeah, I - in my professional opinion, they were a good group to work with. And that's why I sought them out.

Q. And was there any formality associated with that decision -- Let me step back. As part of that then you had to communicate with them todiscuss this possibility of the project at Frame Park, correct?

A. Yes. Yes.

Q. And you might call those negotiations or communications, and that happened over a period of time, correct?

A. Yes.

See Supp. App. 12-14, Depo of K. Lahner at p. 36 -40.

It is clear that the City Administrator had selected Big Top many months prior to the open records response. That preference is concerning, and relevant. But what is directly at issue is the notion that Big Top and/or Big Top in partnership with Waukesha had yet to be selected by the league as of the City

Attorney's October 23, 2017 response letter. Recall that the City Attorney explains that the "competition" as to who will get a baseball team is ongoing and is the basis for withholding the records. *Supp. App. p. 38.*

The City Attorney's explanation for withholding the records raises two different concepts. The first is negotiating with Big Top over the conversion of Frame Park. The second is the idea of the City "competing" with another entity for a baseball team. The City Attorney's explanation does not identify who that might be and the nature of that competition. And as noted the City Administrator had already stated that the competition was over in July/August. *Supp. App. p. 44-45, October 22, 2017 email.*

These two proffered exceptions raised the core legal issue that was presented to the courts below, which was whether the "competitive/bargaining" exception under the *open meetings* law in Wis. Stats. §19.85(1)(e) could be used as an exception to withhold *open records* under § 19.35 and, if it could, whether the City's proffered justification satisfied the statutory standard.

Friends had filed a letter with the City in November 2017 and objected to the City Attorney's withholding of the key draft contracts and asked that they be produced:

> In addition, as you know, requests have been made under the open records law for inspection and/or copying of all public records related to the City and its staff's communications and interactions with Big Top. While some documents have been provided the City has invoked certain of the exceptions to the open meetings law to refuse to provide a copies of key documents, contending that the negotiation regarding the contract between the City and Big Top

> justifies secrecy.
>
> This is a misapplication of the exceptions. This exception is primarily designed to allow a City to engage in review of contracts when there is a competition between potential vendors to the city and multiple bidders. The exception recognizes that the City may need to maintain confidentiality while it negotiates for the benefit of the City.
>
> Here, the exception is being invoked for the apparent benefit of Big Top. The City and Big Top are or should be engaged in an arm's length negotiation. The subject of that negotiation is the disposition of a substantial piece of public property. There is no sound reason under the policy of the open records and open meetings law (nor their exceptions) to withhold documents that have been exchanged between the City and Big Top. The only apparent reason for this action by the City Administrator is so that he can negotiate without any public scrutiny. But this is the antithesis of the purpose of the open records law and of open government generally. The open records law is designed to allow the public to learn about public business contemporaneously as it occurs so that the public can be informed and hold its elected and other officials accountable. Invoking an exception for the purpose of preventing public accountability flies in the face of that policy and the letter and spirit of statute.
>
> Friends and its individual members, including those that have made recent open records requests, reserve all rights to pursue any relief regarding the City's inadequate or incomplete response to these requests.

Supp. App. p. 35-3 to 35-4, November 2017 Objection at pp 6-7.

Despite this objection, the City did not produce any further records during later November and into early December 2017. However, the agenda for the City Council meeting of December 19, 2017 indicated that the issue of the use of Frame Park would be taken up by the Common Council at that meeting. *Supp. App. p. 30, Minutes of December 19, 2917 Common Council meeting showing underlying agenda items.* The records that were being withheld directly

addressed the nature and specific terms that the City Administrator had been negotiating with Big Top regarding the conversion of Frame Park into a for-profit baseball operation. This was the precise and controversial issue that was to be taken up at the December 19, 2017 public meeting. *Id.*

Given this, Friends believed it was necessary to preserve its remedies and somewhat quickly filed the underlying circuit court action seeking production of the withheld records. The summons and complaint was filed the day before the meeting on December 18, 2017. A service copy was provided to the City Attorney by email that evening and then again in the morning of December 19, 2019. The December 19, 2017 Common Council meeting did take up the Frame Park issue. As the minutes indicate, there was little discussion and no resolution of the issue at stake. *Supp. App. p. 30 minutes at p. 6.* The public record shows that the City Administrator was continuing with his negotiations with Big Top and the plans were to move ahead. *Id.* Neither the minutes nor any other public record describe discussions regarding who the City was competing with, or, alternatively, that the competition was resolved or no longer existed. As noted above, there was no closed session associated with this meeting.

The next day, the City Attorney sent an email to counsel for Friends explaining that:

> Dear Mr. Cincotta –
>
> The remaining documents responsive to Mr. Anfinson's October 9th open records request are attached. These are being released

> now because there is no longer any need to protect the City's negotiation and bargaining position.

Supp. App. p. 40.

The City Attorney released the records just two days after Friends filed the underlying mandamus action. These records were not available to the public or to Friends as of the December 19, 2017 City Council meeting. Friends had previously explained in the November 17, 2017 letter to the City Attorney that the withholding of the contractual redlines and similar records did not appear to be permitted under the Open Records law. *Supp. App. p. 35-3 to 35-4.* The City was thus aware of the Plaintiff's position for over a month prior to the Common Council meeting of December 19, 2017, at which time the Frame Park baseball project was to be discussed.

As noted and as is obvious from the record, members of Friends and other citizens were not provided key records showing the contractual terms and conditions being discussed and negotiated with Big Top nor other correspondence. They were thus at a disadvantage at the December 19, 2017 meeting. The City Administrator admitted as much. *Supp. App. p. 18, Depo of K. Lahner at p. 58-60:* 7.

Moreover, it appears that the elected members of the Common Council were also prevented from receiving the withheld documents and information. At his deposition, the City Administrator explained that he could not recall if those

same records had been kept from the Alderman on the City Council at that time. *Supp. App. 21-21, Depo of Lahner at pp. 72-73.*

As noted above, even though the contract documents had been provided, Friends pursued its claim at the circuit court. This was in part because the City's withholding of the records was improper, in Friends' view, and also because the Frame Park development was still in process. The circuit court upheld the City's withholding of the records. The Court of Appeals reversed.

The City argues in its briefing that the Court of Appeals erred in determining that the City's justification for withholding the documents was inapplicable. And thus that the City's delay in providing the records was not unreasonable and was in compliance with the Open Records law. The City also argues that the Court of Appeals has somehow altered or created a new standard for awarding attorneys fees to a prevailing party. As described by the Court of Appeals and herein, Friends believes that the City is in error regarding its arguments and further that the Court of Appeals decision is consistent with and indeed required by the Open Records law.

Further discussion is included below.

ARGUMENT

I. The Court of Appeals properly applied the open records law as per the language of the statute and this Court's rulings in determining that a City may not withhold documents shared with outside non-public private parties.

While the City focuses on the award of attorneys in the first part of its brief, the basis for the award is that Friends prevailed in its claim against the City as decided by the Court of Appeals. Thus, the issue of whether the City's withholding of the draft contracts was allowed is taken up first. The award of attorneys fees under Wis. Stats. § 19.37(2) is taken up second.

The Court of Appeals determination was that the City was wrong to withhold the draft contracts. This ruling is well grounded in both the language and policy of the Open Records law and earlier decisions of this Court and the Courts of Appeals. As the Court of Appeals confirmed:

> [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government .... To that end [the public records law] shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Petitioner's App. p. 112; Decision at ¶ 20

The issue presented is whether the records could be withheld based on the "competitive/bargaining" provisions of the open meetings law. The competitive or bargaining exception is designed to allow municipalities to get the best contract from a vendor. For example, when the City wants to hire a

sanitation contractor, it may get three bids and engage in internal discussions about the bids. Thus, in an open meetings context, those discussions between internal city officials could be held in confidence until the winning bidder is selected. This would be an appropriate application of the competitive/bargaining exception. It would also sensibly apply to public records that contain information about the City's *internal* discussions.

Another possible circumstance would be if a municipality was competing against others for an award of some kind. Again, it would likely be appropriate to keep confidential *internal* communications about how the City was planning to compete for the award.

Here, the City's justifications are somewhat confused, overlapping and ultimately unpersuasive. If the City was competing for something (which was not identified by the City in a concrete way) then *internal* discussions or emails might be properly withheld. However, Friends was not asking for internal emails. Friends requested communications and draft documents between the City and a private third party, Big Top. Thus, there was no way that disclosure of those documents could impact the City's ability to compete with another entity for something- they had already been disclosed to Big Top.

The Court of Appeals agreed:

> ¶43 The City's first stated reason for not releasing the draft contract was that it could suffer competitive harm if the document were disclosed. This document, however, was marked up and exchanged among City and Big Top representatives in a succession

> of back-and-forth edits. To state the obvious, then, any harm from disclosing this document could not relate to the City's negotiating strategy with respect to Big Top.
>
> ¶44. Nor has the City shown that it would have suffered any *other* type of competitive harm had it made the contract available to a member of the public in October 2017. Although the City asserts that another "entity" was competing with it, the evidence shows that the only competition was from one or more business groups that may have been working to locate a Northwoods League team in a different municipality.

See Petitioners App at pp. 126-27, Decision at ¶ 43 and 44.

Moreover, the reality appears to be that it was really Big Top that was competing for the baseball franchise or rights, not the City. The City's use of the competitive/bargaining exception to withhold records from the public (*but not from Big Top)* ends up using the exception to benefit a private party. Understood is this light, the posture of the parties undermines the idea that the City was negotiating with Big Top about something that needed to remain confidential.

In that connection, the City's other justification – which is that it needed to keep the redline contracts between it and Big Top confidential because it was negotiating a deal with Big Top also fails. As the Court of Appeals explained:

> The City's second justification—that the draft contract required common council review before release—fares no better. In his deposition Lahner could not clarify how nondisclosure prior to common council review could create any competitive advantage for the City. For example, when asked how public disclosure during the spring and summer of 2017 could have affected the City's bargaining position, Lahner replied, "I don't know." Thus, the City has not met its burden of showing that "competitive or bargaining reasons *require[d]"* nondisclosure.

> ¶47 At least generally speaking, *City of Milton* further undermines the City's second rationale as well. *City of Milton* prohibits a municipality from invoking Wis. Stat. § 19.85(l)(e) to "save costs" or otherwise prevent "the possible disruption of its plans." *City of Milton,* 300 Wis. 2d. 649, H17-18. This suggests that even if nondisclosure prior to common council review would have streamlined negotiations by, say, avoiding public dissent, § 19.85(l)(e) still might not apply. Nor, under *City of Milton,* would the City be justified in temporarily withholding the draft contract until the common council meeting on the grounds that the contract would be available sometime thereafter. There is "no authority [for] allowing an exception to the requirement of open meetings on the basis of the opportunity for future public input." *City of Milton,* 300 Wis. 2d. 649, ¶17. Finally, to the extent nondisclosure was meant to accommodate Big Top's interests, *City of Milton* is clear: in and of itself, "a private entity's desire for confidentiality does not permit" nondisclosure under § 19.85(l)(e). *City of Milton,* 300 Wis. 2d. 649, ¶13.

Petitioners App at p. 127-28, Decision at ¶s 46-47.

The Court of Appeals *City of Milton* decision is from 2007. The notion of public-private partnerships where City Officials and Planners go from being regulators to quasi-partners is not new. The Court of Appeals was faced with almost exactly the same arguments in *City of Milton* that the City put forward in this case. The Court of Appeals decision below relied heavily and appropriately on *City of Milton*. And just like that decision, the Court of Appeals' decision in this matter is well reasoned and comprehensive. It aligns with the policy of the statute and this Court's previous cases applying that policy and the specific provisions at issue.

This could explain why the City continues to suggest new facts into the record – i.e. that the records were withheld so that they could be reviewed at a closed session meeting by the Common Council ahead of releasing them to the

public.

The City argued in it Petition:

> Friends argued that the City's Common Council improperly entered into a closed session to review the draft contracts. Therefore, it violated the Open Meetings Law when relying on that statutory exemption, and as a result that exemption could not be used in support of non-disclosure of the records in question.

City's Petition for review at p. 27.

In its brief the City argues that:

> Friends argued that based on [City of Milton], the City's Common Council could not properly enter into a closed session to review the draft contracts and as a result that exemption could not be used in support of non-disclosure of the records in question.

City Brief at pp. 34-35.

There was no citation to these supposed argument and it did not happen in any event. The December 19th meeting minutes are included in the record. The format used by the City shows that minutes of meetings are prepared on top of the underlying agenda. Thus the minutes include the underlying agenda. This is relevant because neither the minutes nor the underlying agenda show that the City had properly noticed or went into closed session. However, based on this faulty premise, the City goes on to argue:

> The Court of Appeals, unlike Friends, does not claim that the City's Common Council would violate the Open Meetings Law by entering into a closed session to review and consider the draft contracts,…

City's Brief at p. 35.

Again, this case was not about challenging the use of documents in a

closed session meeting of the Common Council. *Discussions* by City officials in a closed session meeting *about* the draft documents might be protectable. The documents themselves are not.

The City's addition of these facts seems designed to create a more palatable context in which to justify its withholding of the records. The City argues in essence that, "the documents were only being withheld so that the Common Council could get the first crack at them and then we were planning to release them publicly." This is not accurate and finds no support in the record. Indeed, as described above, the City Administrator could not even recall if he had supplied the records to the Common Council members for use at the December 19, 2017 meeting. *Supp. App. p. 22, Depo of K. Lahner at p. 73.*

Moreover, the Court of Appeals considered that scenario in its decision. As it rightly explained:

> *City of Milton* prohibits a municipality from invoking Wis. Stat. § 19.85(l)(e) to "save costs" or otherwise prevent "the possible disruption of its plans." *City of Milton,* 300 Wis. 2d. 649, H17-18. This suggests that even if nondisclosure prior to common council review would have streamlined negotiations by, say, avoiding public dissent, § 19.85(l)(e) still might not apply. Nor, under *City of Milton,* would the City be justified in temporarily withholding the draft contract until the common council meeting on the grounds that the contract would be available sometime thereafter. There is "no authority [for] allowing an exception to the requirement of open meetings on the basis of the opportunity for future public input." … Finally, to the extent nondisclosure was meant to accommodate Big Top's interests, *City of Milton* is clear: in and of itself, "a private entity's desire for confidentiality does not permit" nondisclosure under § 19.85(l)(e).

Petitioner's App at p. 128; Decision at ¶ 47.

The Court of Appeals rejected the notion that use of the documents in a presumably proper closed session justified withholding them in advance of that session. That was because they were not internal documents but had already been disclosed to Big Top. The Court of Appeals continued:

> The City nonetheless maintains that Wis. Stats. § 19.85(l)(e) applies because "[m]eeting in closed session ... was necessary to prevent those with whom the City was negotiating from learning of the Common Council's reactions to proposed terms, preferences, willingness to accept alternatives, and other matters which would put the City at a disadvantage in the bargaining process." The problem with this argument is that Friends was not seeking access to a *meeting*—it was simply seeking disclosure of a *document* that might be discussed at that meeting. By itself, the document could reveal nothing about internal reactions or negotiating strategies.

Petitioner's App at p. 129, Decision at ¶ 49

The City's lengthy effort to justify withholding the records so that the Council Court review them in a closed session is not contemplated or necessary under the competitive or bargaining exception. It may be that internal discussions about the documents could be conducted in a closed session under the exception. But as the Court of Appeals rightly noted, that does not mean the packet of documents that may prompt such a confidential discussion should be or more precisely must be withheld from public disclosure.

As part of this argument, the City's goes to great lengths to claim that no "negotiations" had occurred prior to the December 19, 2017 meeting. Thus, the City argues that the documents that resulted from Administrator Lahner's extensive communications with Big Top cannot be considered negotiations.

Only the Council reviewing the documents in closed session may be considered negotiations. But this proves too much. If the pre-meeting documents and communications are not negotiations under the competitive or bargaining exception, then there is even less reason to withhold them.

As the Court of Appeals held and explained, the draft contracts did not need to be withheld to allow for a meaningful closed session meeting to discuss the drafts and more precisely to allow confidential discussion of the already known terms vis-à-vis Big Top, without Big Top being present. Based on the City's argument – that the Common Council is the only body that can bind the City, there is no impact to the City's bargaining position that results from disclosure of the draft contracts before the Common Council discussed them in a closed session.

In a case where there actually is a closed session meeting, there may well be more public scrutiny of the Common Council's ultimately decision regarding the terms in the draft contracts when the contracts are disclosed prior to such a meeting. But that is explicitly what the Open Records Law calls for.

The Court of Appeals decision is solidly based on and drawn from both the language and policy of the open records law. It is almost always more convenient for governmental officials to avoid scrutiny on controversial matters. But as Friends argued below, and the Court of Appeals recognized, that approach is the antithesis of the policy behind our State's open records law.

The Court of Appeals decision is consistent with its previous rulings and those of this Court as well as the language and policy of the statute and should be affirmed by the Court.

II. The Court of Appeals did not create or change the standard for awarding attorneys fees to prevailing parties in open records cases

The City spends much of its briefing focusing on its view that the Court of Appeals has changed the law regarding when an award of attorneys fees is appropriate in an open records case under the provisions in Wis. Stats. § 19.37(2). Citing the Court of Appeals decision, the City argues that:

> "… according to the Court of Appeals, in determining whether a party prevails in a public records case it is not necessary that a lawsuit be a cause of the release of records:
>
> "We hold that where litigation is pending and an authority releases a public record because a public records exception is no longer applicable, causation is not the appropriate inquiry for determining whether the requesting party 'substantially prevailed.' Rather, the key consideration is whether the authority properly invoked the exception in its initial decision to withhold release."

City's Brief at p. 10-11. The City's argument is hard to follow in parts but seems to boil down to a view that factual causation must always be shown ***even*** when the reason for delay in releasing otherwise responsive records is found to be in error. The City misconstrues both the catalyst/causation test and the analysis and holding of the Court of Appeals. As the Court of Appeals explained in discussing the key decision in *Racine Education Association v. Board of Education for Racine Unified Schools*, 129 Wis.2d 319 (Ct.App.1986)

> Because the test was "largely a question of causation," we did not consider whether there was a violation of the statute. ***Racine Educ. Ass'n,*** 129 Wis. 2d at 327-28 … Instead, we decided that the requesting party was *not* entitled to fees because the lawsuit was not a cause of the release; rather, there was "an unavoidable delay accompanied by due diligence in the administrative processes.

Petitioners App, at p. 113, Decision at p. 13 ¶ 23.

> In the *Racine Education Association* decisions, our stated focus on the lawsuit as a cause-in-fact clearly dovetailed with our consideration of whether there was an unreasonable (as opposed to an unavoidable) delay in release. If we had determined that there *was* an unreasonable delay in that case, the outcome undoubtedly would have been different. Thus the *Racine Education Association* decisions adopted causation as the test for prevailing-party status, but the application of that test was intertwined with the court's finding that there was no violation of the statute: the "cause" of the release was not the commencement of a lawsuit but the authority's prompt action once the records became available.

Petitioners App at p. 114; Decision at ¶ 24.

The Court of Appeals rightly noted that its "causation " rulings have occurred in cases where the issue of whether the governing body improperly relied on (and thus improperly delayed producing the challenged records) has not been directly addressed of decided. *Petitioner's App at p. 114; Decision at ¶ 24.* That is the key difference here. Even taking the City at its word that it was withholding the records under a genuine belief that the competitive/bargaining exception applied, and thus that when it did release them it was because it genuinely believed the exception no longer applied, if the City was wrong from the outset, it seems contrary to the policy and language of the statute to deny an award of fees to the party that demonstrates the violation. As the Court of Appeals noted:

> " ...application of a causation analysis in all cases would likely thwart the goal of our public records law: to provide "*timely* access to the affairs of government," *WTMJ, Inc.*, 204 Wis. 2d at 457 (citation omitted), "as soon as practicable and without delay," *id.* (quoting Wis. Stat. § 19.35(4)). After all, "the purpose of [Wis. Stat. § 19.37(2)(a)] is to encourage voluntary compliance; if the government can force a party into litigation and then deprive that party of the right to recover expenses by later disclosure, it would render the purpose nugatory."

Petitioner's App at p. 118; Decision at ¶ 29.

It worth noting, as the Court of Appeals implicitly does, that the causation analysis is not part of the language of the statute itself, which provides that:

> Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester *prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record* or part of a record under s. 19.35 (1) (a).

See Petitioner's App p. 104, Decision at p. 3 ¶ 4 discussion requirement for timely disclosure under Wis. Stats. § 19.35(4)(a).

The City's brief evaluates and analyzes the federal FOIA cases that have informed this Court and the Court of Appeals previous decisions. However, the Court of Appeals analysis of the holdings in those federal cases, primarily *Cox* and the more recent *Church of Scientology*, is well set forth in the Court of Appeals decision. That analysis very aptly demonstrates that when a requester prevails in showing that the governmental body acted out of compliance with what the law requires, the catalyst/causation doctrine strongly supports an award of attorneys fees. Indeed, the idea of substantially prevailing means that fees may sometimes be awarded even when the governmental body was not wrong or fully wrong under

the law with respect to its determination that the records could be withheld. Certainly, when the governmental body has erred as a matter of law, and that is shown by a requester pursuing his or her claim under the statute, that requester must be considered to have prevailed in the case.

Friends has prevailed as a result of the Court of Appeals' thorough analysis, reasoning, and application of the open meetings law consistent with its purpose and intent. To deny Friends an award of reasonable actual attorneys fees now would run strongly contrary to the statutory directive. As the Court noted, strict application of the causation test will often deprive requesters of appropriate awards even when they prevail at showing that the governing body acted erroneously. That will deter both pursuing meritorious claims and could at the margin encourage more withholding of records given the low chance of any concrete consequence from doing so.

The Court of Appeals decision is well grounded in the language and policy of the statute and in the Courts' previous rulings regarding an award of fees to prevailing parties. Plaintiff-Appellant asks that the Court affirm the Court of Appeals ruling regarding the award of fees in cases where the requester prevails in pursuing what is their only relief of a mandamus action.

CONCLUSION

For the above reasons, Plaintiff-Appellant respectfully requests that the Court affirm the Court of Appeals in full and remand this matter to the circuit court for proceedings consistent with that decision.

Dated this 16th day of April, 2021

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CERTIFICATIONS PURSUANT TO WIS. STATS. § 809.19(2) and (8).

I certify that this Brief conforms to the rules contained in s. 809.62(4) and 809.19(8) (b) and (d) for a Brief produced with a proportional serif font. The length of this brief is 7191 words.

Joseph R. Cincotta

I hereby also certify that filed with and included in this brief is a supplemental appendix that complies with s. 809.62(2) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the

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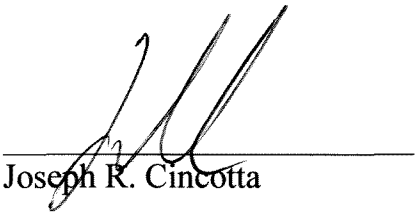

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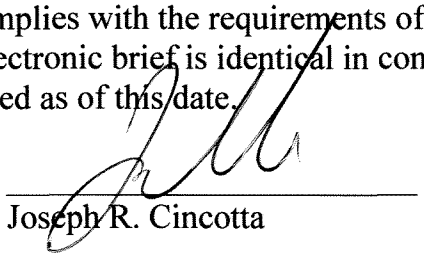
I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.62(4)(b) and 809.19(12) and that said electronic brief is identical in content and format to the printed form of the brief filed as of this date.



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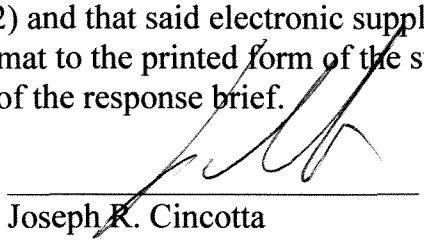
I certify that I have submitted an electronic copy of the supplemental appendix as a separate electronic document which complies with the requirements of s. 809.62(4)(b) and 809.19(12) and that said electronic supplemental appendix is identical in content and format to the printed form of the supplemental appendix filed as of this date as part of the response brief.



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